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No. 02-1049

In the

Supreme Court of the United States

WILL TINNER,

Petitioner,

v.

UNITED INSURANCE COMPANY OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Tinner's Petition for a Writ of Certiorari (hereinafter "Petition") should be denied because the proper standard for a peremptory challenge of a minority juror is well-settled, uniformly applied in the lower courts and there is no need for a change in the standard of review. Both the trial court and the Seventh Circuit properly applied this Court's *Batson* jurisprudence in finding the peremptory challenge did not violate the Equal Protection Clause. There is neither an egregious error this Court must address to redress a wrong nor a compelling reason to grant a writ of certiorari.

I.
THE FACTS AND ISSUES PRESENTED IN *MILLER-EL* ARE NOT ANALOGOUS TO THE CASE AT BAR

Tinner asserts that his Petition presents essentially the same question as that before this Court in *Miller-El v. Cockrell*, U.S. Supreme Court Docket No. 01-7662, a death penalty case arising out of Dallas County, Texas, in which the defendant, Miller-El, seeks habeas relief from a capital murder conviction. (Petition p. 2, 3.) But the facts of this case and the procedure followed by the lower courts are not comparable to the facts or procedure in *Miller-El*, except that in both cases the petitioner alleges error occurred during jury selection. *See Miller-El v. Johnson*, 261 F.3d 445 (5th Cir. 2001).

A. There is No Evidence of Intent to Discriminate Such as that Alleged in Miller-El.

In the present case, there is no historical background of discrimination such as that alleged by Miller-El to have occurred in Dallas County, Texas. Unlike *Miller-El*, there is no statistical evidence in this case supporting an inference of discrimination, no prosecutor's manual with instructions to consider ethnicity in jury selection, and no allegation of pattern and practice discrimination. There is no other circumstantial evidence of discrimination such as the notations regarding race and gender on jury cards or questionnaires, the disparate questioning of minority jurors or the "jury shuffle" which occurred in *Miller-El*. Indeed, Tinner himself admits that no such circumstantial or statistical evidence of discrimination exists in this case. (Petition p. 3.)

Miller-El was tried to a jury approximately one month before this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). After the case was remanded, the trial judge conducted a *Batson* hearing over two years after *voir dire* was conducted and the prosecutor gave his contemporaneous reasons for striking the jurors. (Transcript of Oral Argument p. 6.)[1] During the more than two years after the *voir dire* in *Miller-El*, the same trial judge presided over jury selection in more than two dozen cases, likely with numerous *Batson* challenges and explanations. Thus the ability of that judge to accurately recall and evaluate juror testimony, voice inflection, gestures, emotions, body language and other traits in concert with trial

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[1] Transcript of Oral Argument, October 16, 2002, Docket No. 01-7662.

counsel's demeanor and conduct presented a unique situation not even remotely similar to the facts in this case.

B. The Undisputed Facts Show the Jury Selection in This Case is Not Comparable to that In *Miller-El*.

During *voir dire* in the present case two prospective jurors responded to the same question:

> Do any of you know anyone who's filed a suit alleging discrimination of any kind? If you do, do you know – anybody know of or heard of anybody who's filed a suit alleging discrimination?

(Trial Trans. p. 56, ll. 14-17.) Prospective Juror Kuester, a white male, and Prospective Juror Clardy, a black female, answered affirmatively to this question. (Trial Trans. p. 56, ll. 14-24.) Mr. Kuester had stated earlier in response to questions by Tinner's trial counsel:

> I think I could be fair. You should probably know that my corporation has – have not personally been involved in any lawsuits, but we have been accused of racial discrimination, and it was never – it was never – one case, there was a complaint filed with the EEOC, and they came back with a ruling that there was no indication of discrimination.

(Trial Trans. p. 41, l. 22—p. 42, l. 3.) When asked if the fact his company had been accused of race discrimination would make it difficult for him to listen to Tinner's case and hear it fairly, Mr. Kuester

responded, "I don't think so." (Trial Trans. p. 42, ll. 4-7.) Mr. Kuester went on to state with regard to race discrimination:

> I know it goes on. There are – I think there are cases where discrimination is claimed where there possibly was none, but there's certainly racial discrimination that's ongoing in our country. It's not right.

(Trial Trans. p. 42, ll. 18-24.)

In response to the same question, Prospective Juror Clardy stated that her sister had filed a discrimination claim. (Trial Trans. p. 56, l. 23—p. 57, l. 1.) When counsel for United Insurance followed up on the response and inquired whether the fact that her sister had filed a lawsuit alleging discrimination would affect her determination in this case, Ms. Clardy responded:

> It's hard to say because I didn't go through the courts with her. Basically, I know what happened or what she told me was her ordeal, but as far as the company she was working with, you know, I don't know.

(Trial Trans. p. 57, ll. 3-9.)

Counsel for Tinner exercised one of his peremptory challenges to strike Mr. Kuester. (Trial Trans. p. 68, ll. 17-19.) Counsel for United Insurance exercised one of his peremptory challenges to strike Ms. Clardy. (Trial Trans. p. 68, l. 24.) Tinner's trial counsel immediately challenged the strike of Ms. Clardy and the trial court conducted a contemporaneous *Batson* hearing. The trial court evaluated United Insurance's

articulated reason for the peremptory challenge—Ms. Clardy's sister had filed a similar discrimination claim against her employer and that she characterized the situation as an "ordeal", the demeanor of the prospective juror and trial counsel during the questioning, and the demeanor of trial counsel during the *Batson* hearing. (Trial Trans. p. 70, ll. 1-6.) The court ruled that United Insurance's explanation was not a pretext for discrimination, reasoning that the fact Ms. Clardy "had a family member involved in the same type of litigation" may "make it difficult for her to remain objective" in the present case. (Trial Trans. p. 73, l. 21—p. 74, l. 3.) As Ms. Clardy stated herself, "[i]t's hard to say" if her sister's lawsuit would effect her opinions in the present case. (Trial Trans. p. 57, ll. 6-9.) The court of appeals upheld the trial court's ruling in a carefully reasoned published decision. *Tinner v. United Ins. Co. of America*, 308 F.3d 697 (7th Cir. 2002).

In oral argument before this Court, counsel for Miller-El pointed to the hypothetical case described in *Hernandez v. New York*, 500 U.S. 352 (1991) in which the evidence of racial discrimination during *voir dire* was so strong that, "a finding of no discrimination is simply too incredible to be accepted." (Transcript of Oral Argument p. 3.) Miller-El's counsel went on to state of *Miller-El v. Cockrell*, "This is truly that exceptional case, and therefore the Court should use it as a model, a model of the weight of evidence sufficient to render objectively unreasonable a trial judge's rejection of a Batson challenge." (Transcript of Oral Argument p. 3, ll. 11-19.)

In contrast, this is *not* that truly exceptional case and there is absolutely no basis upon which to determine the trial court's rejection of Tinner's *Batson* challenge was erroneous. Unlike *Miller-El*, the facts

here are simple and undisputed. The only issue before the Court is United Insurance's peremptory challenge of one African-American juror and the trial court's ruling following a *Batson* hearing held at the time of the peremptory challenge.

Tinner has not pointed to any evidence of discriminatory intent in the statements, conduct, or demeanor of United Insurance's trial counsel during *voir dire*, other than United Insurance's strike of Potential Juror Francis. Contrary to Tinner's assertion, the peremptory challenge of Potential Juror Francis, a Caucasian female, is not evidence of discriminatory intent. This Court has stated that the purpose of the peremptory challenge is to "assure the selection of a qualified *and unbiased* jury" by enabling each party to exclude jurors believed to be more partial to the other side and preventing individuals biased in either direction from being impaneled. *Holland v. Illinois*, 493 U.S. 474, 484 (1990)(quoting *Batson*, 476 U.S. at 91)(emphasis by *Holland* court). Counsel for United Insurance properly struck Ms. Francis because her answers provided evidence of the potential for bias towards the plaintiff; just as Mr. Kuester was presumably stricken by Tinner, because of the potential for bias towards the defense.

C. The Standard of Review Here Differs from that Applicable in *Miller-El*.

This is a direct appeal from an adverse jury verdict in a race discrimination claim brought under Title VII of the Civil Rights Act of 1964, rather than an appeal from a denial of a petition for habeas relief. Thus a different standard of review applies here. The issue in *Miller-El* is whether the Fifth Circuit erred in refusing to issue a certificate of appeal based on the lower court's denial of Miller-El's petition for a writ of habeas corpus.

A certificate of appeal should be issued if "the applicant has made a substantial showing of a denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)(quoting 28 U.S.C. § 2253(c)). An applicant has made a "substantial showing" where the petitioner demonstrates his petition for habeas relief involves issues which are debatable among jurists of reason, that another court could resolve differently, or that the issues are adequate to deserve encouragement to precede further. *Id.* at 484.

Here, the standard of review is simply whether the trial court's determination that United Insurance's peremptory challenge of Prospective Juror Clardy was not discriminatory is "clearly erroneous." *Hernandez*, 500 U.S. at 365. "[W]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 369 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)). As the Seventh Circuit has stated in applying the "clearly erroneous" standard: "When in response to a Batson challenge the [striking party] gives a race-neutral reason that persuades the judge, there is no basis for reversal on appeal unless the reason given is completely outlandish or there is other evidence which demonstrates falsity." *Morse v. Hanks*, 172 F.3d 983, 985 (7th Cir. 1999)(quoting *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998)).

II.
A CHANGE IN THE *BATSON* STANDARD OF REVIEW IS INAPPROPRIATE AND USE OF THIS COURT'S SUPERVISORY AUTHORITY IS UNNECESSARY.

In oral argument before this Court, counsel for Miller-El conceded that minority jurors could legitimately be stricken for cause as well as through peremptory challenges:

> Mr. Waxman: The prosecution said we had two different ways of questioning about these two subjects, and we used them deliberately at—with different jurors and we did it in order to remove jurors that we thought were weak on the death penalty. That is the reason that they give and that's the reason against which their justification must be judged . . .
>
> Question: You would concede that would be legitimate?
>
> Mr. Waxman: Sure . . .

(Transcript of Oral Argument p. 16.) Miller-El's counsel was not arguing for a new or different standard to be established for evaluating a strike of a minority juror. Instead, he argued that *Miller-El* was an exceptional case and that the trial court did, in fact, err in its application of *Batson* and its progeny. In contrast, Tinner does not argue that his case is exceptional, but that this Court should exercise its supervisory authority over the lower courts to create a new standard under which the criteria used to strike Ms. Clardy would be considered violative of the Equal Protection Clause.

(Petition pp. 9-11.) Such an exercise of this Court's supervisory authority is unnecessary and would be inappropriate.

A. "Clearly Erroneous" is the Proper Standard of Review for a *Batson* Challenge.

A trial court's determination regarding a *Batson* challenge is a purely factual determination. *Batson*, 476 U.S at 98 n. 21. Consequently, a federal appellate court must review a trial court's ruling under Federal Rule of Civil Procedure 52(a) which permits factual findings to be set aside only if clearly erroneous. It is unnecessary for this Court to accept certiorari to change the standard of review on appeal from "clearly erroneous" to "*de novo*" because such an exception to this rule for review of *Batson* challenges would be inappropriate. (Petition pp. 23-24.)

A *de novo* standard of review is appropriate for a trial court's ruling on a motion for summary judgment because summary judgment seeks a judgment as a matter of law. Unlike a *Batson* challenge, all of the facts and evidence available to the trial court are also in the record and available to the appellate court on summary judgment. The trial court's determination on summary judgment does not turn on credibility of witnesses, but rather on the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" which show that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(e). A grant of summary judgment is a final judgment that irrevocably denies a party's right and opportunity to present his or her case to a jury. As such, *de novo*

review of all of the evidence that was before the trial court is appropriate and necessary.

In contrast, a more deferential standard of review is particularly appropriate for a trial judge's factual finding at stage three of the *Batson* analysis because only the trial judge is able to observe the demeanor and credibility of both the prospective jurors and trial counsel during *voir dire*. The credibility of the counsel exercising the challenge is central to the *Batson* inquiry. *Batson*, 476 U.S. at 98, n. 21. "The manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record." *Patton v. Yount*, 467 U.S. 1025, 1037 (1984)(internal citations omitted). Thus, a trial judge's ability to witness venire members "[d]emeanor, inflection, [and] the flow of the questions and answers" places him in the best position to gauge whether counsel's reason for striking a particular venire member is credible or pretextual. *Id.* at 1038, n. 14.

A new standard of review is unnecessary to permit appellate courts to review and correct any errors made by the trial court. Even such considerable deference does not prevent appellate courts from stepping in to correct the trial court's determination where discriminatory intent is clear on the face of the record itself, *Splunge v. Clark*, 960 F.2d 705, 708-09 (7th Cir. 1992), or where the trial court has applied an improper standard in its determination. *Coulter v. Gilmore*, 155 F.3d 912, 921 (7th Cir. 1998).

B. A Change in the Trial Burden to "Clear and Convincing Evidence" is Unnecessary.

A change in the trial burden of proof on the party exercising the peremptory challenge to "clear and convincing evidence" is similarly inappropriate and unnecessary. (Petition pp. 23-26.) Historically, a clear and convincing evidence standard has been applied "where the claimant either sought extraordinary relief or based his claim on disfavored grounds, or where he sought relief which would have serious social consequences or harsh effects on an individual beyond the mere award of money damages." Comment, 24 EMORY L.J. 105, 114 (1975). Use of a peremptory challenge is not "extraordinary relief" nor is it disfavored. On the contrary, the peremptory challenge at issue here exemplifies the very purpose of the peremptory challenge—to protect each party's right to trial by a neutral and unbiased jury.

C. Importing Title VII Standards for Proving "Pretext" at Stage Three of the *Batson* Inquiry Would Not Change the Analysis or the Outcome Here.

Tinner also suggests importing Title VII standards for the trial court's determination at step three of the *Batson* inquiry. (Petition pp. 17-19.) Petitioner's brief is not entirely clear in how imputing Title VII standards would change step three of the *Batson* analysis.

Under Title VII, once a *prima facie* claim of discrimination has been established and the employee-defendant has articulated a race-neutral reason for the employment decision complained of, the burden of proof shifts back to the plaintiff-employee to

demonstrate that the reason articulated is a pretext for discrimination. *Kulumani v. Blue Cross Blue Shield*, 224 F.3d 681, 684 (7th Cir. 2000). In other words, the employee must demonstrate that the articulated reason is a lie—a fabrication designed to conceal the true unlawful motivation for the decision. *Id.*

While never so clearly defined in the *Batson* context, this is essentially the standard currently being applied in determining whether the proffered reason for a peremptory challenge was made with intent to discriminate at stage three of the *Batson* analysis. As discussed above, considering the totality of the circumstances, the trial court must make a determination as to the credibility of counsel making the strike and whether the proffered explanation is a pretext for unlawful discriminatory intent.

The only distinction between the *McDonnell Douglas* burden shifting mechanism applied in employment discrimination cases and the *Batson* inquiry is that under *McDonnell Douglas*, at the third step the burden of proof shifts back to the plaintiff-employee to demonstrate the proffered reason is pretextual, rather than simply leaving this determination to the finder of fact as in the *Batson* context. This is a difference without distinction that, if anything, may place a heavier burden on the party attempting to prove purposeful discrimination. In either event, there still must be a showing of intent to discriminate.

III.
THE STANDARD FOR APPLICATION OF EQUAL PROTECTION REQUIREMENTS TO PEREMPTORY CHALLENGES IS WELL-SETTLED AND UNIFORMLY APPLIED THROUGHOUT THE CIRCUITS.

This case involves the application of well-settled constitutional principles to relatively simple facts. Thus the Petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction.

A. There Is No Need to Address Alleged Misperceptions Arising From *Purkett*.

The standard for trial courts to apply in determining whether a peremptory challenge is discriminatory was clearly articulated by this Court in *Batson v. Kentucky*, 476 U.S. at 96-98, and has been further clarified by this Court's decisions in *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991), *Hernandez v. New York*, 500 U.S. at 359-66, and *Purkett v. Elem*, 514 U.S. 765, 768-69 (1995).

In *Purkett*, this Court clarified the standard to be applied at step two of the *Batson* analysis, the stage at which the party exercising the peremptory challenge must articulate a race neutral reason for the strike. At step two of the *Batson* inquiry, "the issue is the facial validity of the [striking party's] explanation. Unless a discriminatory intent is inherent in the [striking party's] explanation, the reason offered will be deemed race neutral." *Purkett*, 514 U.S. at 768. At this stage, all that is required of the proponent is a "'clear and reasonably specific' explanation of his 'legitimate reason' for exercising the challenge." *Id.* (quoting *Batson*, 476 U.S. at 98.) Any characteristic that is not "peculiar to any

race"–even a "silly or superstitious" explanation—is satisfactory at stage two. *Id.*

Tinner argues that lower courts' "misperception" of this holding has effectively extinguished the right of a litigant making a *Batson* challenge to a non-pretextual reason for the challenge. (Petition p. 3-4, 17, 19-20.) However, *Purkett* is clear in holding that while "silly or superstitious" reasons must be accepted at stage two as long as discrimination is not inherent in the reason, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination" by the trial court at stage three. *Id.* At stage three of the inquiry, the trial court must consider "all relevant circumstances" including a pattern of strikes against black jurors, *Batson*, 476 U.S. at 97, whether the rationale for the strike was applied consistently to all similarly situated members of the venire, *Coulter*, 155 F.3d at 921, the truth of the proffered explanation, *Splunge*, 960 F.2d at 708, disparate questioning of jurors, and the demeanor and credibility of both the prospective juror and the attorney exercising the challenge. *Hernandez*, 500 U.S. at 365.

B. The Lower Courts Have Uniformly and Properly Applied *Batson*'s "All Relevant Circumstances" Requirement at Step Three of the Analysis.

United States district courts and courts of appeal, with the possible exception of the Fifth Circuit's decision in *Miller-El*, have uniformly applied the standard articulated in *Batson* and its progeny to ensure the equal protection rights of litigants and prospective jurors are protected. Based on this standard, the Seventh Circuit recently rejected a state court's ruling on a *Batson* challenge, holding the court's refusal to

consider statistical evidence of disparities in the state's application of the articulated race-neutral reasons for its use of peremptory challenges was an "unreasonable application" of *Batson*'s "all relevant circumstances" requirement at step three of the analysis. *Henderson v. Walls*, 296 F.3d 541, 550-51 (7th Cir. 2002).

In *Coulter v. Gilmore*, 155 F.3d at 921-22, the Seventh Circuit re-affirmed this principle in holding a state trial court violated *Batson* by utilizing a procedure which prevented him from considering the "totality of the circumstances" at step three of the *Batson* analysis.

In *Splunge v. Clark*, 960 F.2d at 707-08, the state's use of peremptory challenges to exclude a black venire member violated *Batson* where, during *voir dire*, the prosecutor asked the only two black venire members whether their race would cause them to be biased towards the defendant because he is black and asked one of the black venire members if he knew anyone who had been charged with a crime, while he asked the next three white venire members whether they or their friends had ever been the victim of a crime. The prosecutor's articulated reason for the challenge was the juror did not exhibit a good understanding of the standard "beyond a reasonable doubt." *Id.* at 708. The Seventh Circuit properly applied *Batson* and its progeny to reject the challenge as unconstitutional because of the disparate questioning of the prospective jurors, the lack of any evidence in the record that the juror did not understand the standard of proof to be applied in a criminal trial, and the fact that a white juror with an identical answer to questions regarding the standard of proof was not stricken. *Id.* at 708-09.

The Third Circuit applied this principle to overturn the denial of a habeas corpus relief because the

record did not show that the state court had considered all of the relevant evidence at stage three of the *Batson* analysis. *Riley v. Taylor*, 277 F.3d 261, 286-87 (3rd Cir. 2001)(en banc). The court stated that in light of the "perfunctory quality" of the second step of the *Batson* inquiry following *Purkett*, "it is even more important today than ever that the Batson inquiry not omit consideration of the totality of the circumstances, both for itself and as it relates to the evaluation of similarly situated potential jurors . . .." *Id.* at 287.

The Tenth Circuit also recently applied *Batson* to uphold a trial court's denial of a defendant-employer's peremptory challenge of a female venire member in a gender discrimination case. *Davey v. Lockheed Martin Corp.*, 301 F.3d 1204, 1216 (10th Cir. 2002). Defense counsel challenged three female prospective jurors because none of them were currently employed and "would not have that perspective to bring to deliberations." *Id.* at 1215. The trial court assessed the credibility of the proffered explanation based upon all of the relevant circumstances and found the reason pretextual as to one of the prospective jurors who had significant past work experience. *Id. Also see United States v. Bishop*, 959 F.2d 820 (9th Cir. 1992)(prosecutor's reason for peremptory challenge, that juror lived in predominantly low-income black neighborhood and was likely to believe that police "pick on black people," was not an adequate, race-neutral explanation as required by *Batson* because it "reflected and conveyed deeply ingrained and pernicious stereotypes" rather than a link between a specific juror and the facts of the case); *United States v. Wynn*, 20 F.Supp.2d 7 (D. D.C. 1997)(use of facially race-neutral criteria to exclude venire members is a pretext for discrimination where the record reveals the criteria

were applied inconsistently to members of different races).

Lower courts have also properly applied *Batson* and its progeny to determine peremptory challenges of minority jurors do *not* violate equal protection requirements. *See United States v. Bartholomew*, 310 F.3d 912 (6th Cir. 2002)(trial court did not err in holding prosecution's strike of three black females was not discriminatory where two had relatives in the criminal justice system, the third impressed the prosecutor as a highly opinionated person, and the removal of the jurors still left a majority-female jury that included two African Americans); *Devoil-El v. Groose*, 160 F.3d 1184 (8th Cir. 1998)(trial court did not err in finding a venire member's unemployment, having a relative in jail, dissatisfaction with the police, having been charged with a crime, and having been a crime victim were not racially-motivated reasons for use of a peremptory challenge); *United States v. Brown*, 299 F.3d 1252 (11th Cir. 2002)(trial court did not commit clear error in finding the race-neutral reasons offered by the government were credible where all of the relevant circumstances were considered including the government's motion in limine to exclude evidence that the defendant had been targeted by government officials because of her race and the defendant introduced no evidence to discredit the proffered explanations and establish pretext).

Because this Court's well-settled and clearly articulated standard for use of a peremptory challenge to strike minority jurors has been uniformly and properly applied in the lower courts, no further clarification is necessary.

IV.

THE COURTS BELOW PROPERLY APPLIED *BATSON* JURISPRUDENCE IN DETERMINING THE PEREMPTORY CHALLENGE DID NOT VIOLATE EQUAL PROTECTION REQUIREMENTS.

Unlike the trial judge in *Miller-El*, the trial court in the present case had the benefit of the guidance provided by this Court's decisions in *Hernandez*, *Edmonson*, *J.E.B.* and *Purkett*, when it conducted the *Batson* hearing in this case and made its determination regarding the challenged jury strike. The trial court correctly applied the standards articulated by the Court in these decisions in determining the strike of Ms. Clardy was not made with intent to discriminate, and that determination is entitled to great deference.

A. The Question at Issue is Not a Surrogate for Race.

In his Petition Tinner argues, "[u]nsurprisingly in view of her race, Ms. Clardy answered in the affirmative that she knew someone who had been involved in a prior discrimination suit." (Petition p. 6.) He went on to state, "It is beyond argument that a *voir dire* question directed to a potential juror asking whether she 'knows' or is 'related to' anyone who has filed a discrimination claim is more likely to elicit a positive response from a black venire member than others." (Petition p. 15.) Finally, he asserts that if knowledge of a prior discrimination case and the characterization of it as an 'ordeal' is a race-neutral reason for striking an African-American juror, "no civil rights defendant . . .will ever be [tried before] a broad cross-section of the community, because it will never include an African-American among its number." (Petition p. 22.)

No such claim was raised at the time of the *Batson* hearing during the trial in this matter and Tinner has not presented any statistical evidence to support these assertions since that time. It is absurd to suggest there will never be an African-American venire member who does not know or is not related to someone who has filed a claim of discrimination. Such an argument relies upon the very kind of stereotypical notions Tinner rightly abhors.

When the central issue in a case is discrimination, trial counsel would be remiss in his duty to his client if he did not inquire into prospective jurors experiences or attitudes about that issue in order to obtain unbiased jurors. The very purpose of *voir dire* is to allow each party to question prospective jurors to determine potential biases and thus assure both the reality and appearance of a qualified and unbiased jury. *Holland*, 493 U.S. at 484.

B. Disparate Impact of a Criteria is Not Conclusive Evidence of Intent to Discriminate.

Assuming, *arguendo*, an African-American venire member is *more likely* to answer affirmatively to the question at issue than a non-minority member of a panel, such a correlation does not equate with a surrogate for race.[2] In applying *Batson*, this Court has followed the long-established equal protection principle that disparate impact alone is insufficient to prove discriminatory intent. *Washington v. Davis*, 426 U.S. 229, 242 (1976)(holding a test which was neutral on its

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[2] United Insurance notes that Tinner has provided no statistical evidence of any such correlation. In this case, one white male and one black female responded affirmatively to the same question.

face did not violate equal protection solely because it had a racially disproportionate impact.) This principle was affirmed in the *Batson* context in *Hernandez*, 500 U.S. at 360, and *J.E.B. v. Alabama*, 511 U.S. 127, 143 (1994). In *Hernandez*, the Court stated "official action will not be held unconstitutional solely because it results in a racially disproportionate impact . . . Proof of racially discriminatory *intent* or *purpose* is required to show a violation of the Equal Protection Clause." 500 U.S. at 360. Further, "strikes based on characteristics that are disproportionately associated with [any minority] could be appropriate, absent a showing of pretext." *J.E.B.*, 511 U.S. at 143. For this Court to hold, as Tinner seeks, that an affirmative response to the *voir dire* question "Do you know anyone who has filed a discrimination claim?" cannot be a race-neutral reason for a strike because the question may disproportionately affect minority jurors would fly in the face of the well-established constitutional principle that an equal protection violation requires proof of discriminatory *intent*.

The courts below correctly found that Tinner did not establish United Insurance acted with discriminatory intent in exercising a peremptory challenge to strike Prospective Juror Clardy. The trial court heard the entire *voir dire*, conducted a *Batson* hearing immediately after the peremptory challenge was made, evaluated the statements, demeanor and body language of both the prospective juror and trial counsel, and determined there was no intent to discriminate based on race.

C. The Facts Underlying Tinner's Title VII Claim Provide No Justification for this Court's Exercise of Its Certiorari Jurisdiction.

Even if this Court believes further clarification of the standard to be applied in evaluating *Batson* challenges may assist lower courts, this case is not the appropriate vehicle for such clarification. Constitutional principles were properly applied in the selection of the jury before whom Tinner's Title VII claim was tried and the verdict reached by that jury was supported by both fact and law.

Tinner was employed as a Sales Representative in United Insurance's Evansville, Indiana office from March 19, 1990, through June 10, 1996. (ROA, Doc. 32, Ex. A, para. 5.) He was terminated on June 10, 1996, because he failed to appear for work or present a doctor's excuse for his absence. (ROA, Doc. 32, Ex. A, para. 43.) Contrary to Tinner's assertion, there is no evidence in the record that his colleagues "judged him uniformly to be professional, hard-working, and business-like." (Petition p. 3.) Nor is there evidence in the record to support Tinner's assertion that his employer had knowledge he was absent from work due to a "medically-verified back condition." (Petition p. 4.)

On or around May 10, 1996, Tinner requested one week of vacation from June 10, 1996, to June 14, 1996. (ROA, Doc. 32, Ex. A, para. 27.) His supervisor denied the request because Tinner had taken a week of vacation less than one month earlier and because he was not meeting the expected sales increase for his debit route. (ROA, Doc. 32, Ex. A, paras. 30-33.) On Monday, June 3, 1996, Tinner called in sick. (ROA, Doc. 32, Ex. A, para. 34.) He did not present a doctor's

excuse or contact his staff manager or district manager as required by Company policy. (ROA, Doc. 32, Ex. A, paras. 35-36.) Tinner was absent the entire week of June 3, 1996. (ROA, Doc. 32, Ex. A, para. 37.)

On June 6, his staff manager informed him he must report to work on Monday, June 10, 1996, or have a doctor's note excusing him from work, or it would be assumed he wished to terminate his employment with United Insurance. (ROA, Doc. 32, Ex. A, para. 39-40.) On June 10, Tinner went to the United Insurance office and gave the office administrator a note stating his last day of work would be June 21, 1996, and a "Certificate to Return to Work" signed by his doctor stating Tinner was able to return to work on June 10, 1996. (ROA, Doc. 32, Ex. A, paras. 41-42.) Despite being released to return to work on June 10, Tinner did not return to work. (ROA, Doc. 32, Ex. A, para. 42.) In a letter dated June 11, 1996, his staff manager informed him his employment with United Insurance ended as of June 10, 1996, due to his failure to appear for work. (ROA, Doc. 32, Ex. A, para. 43.)

Tinner filed suit against United Insurance alleging race discrimination. (ROA, Doc. 1.) At trial he argued that his former employer discriminated against him on the basis of his race in wrongfully terminating his employment ten days prior to the date he intended to quit.

Tinner implies that United Insurance's strike of Ms. Clardy prevented him from obtaining a fair trial in part because "conflicting testimony [of witnesses] broke down along racial lines." (Petition pp. 7-9.) Yet ample evidence was produced at trial for the jury to find the testimony of certain witnesses called by Tinner less credible than certain defense witnesses. For example,

Clarence James, William Taylor, and Scott Wright were seated at the same table in a restaurant when two of these individuals claimed they overheard a conversation at another table. William Taylor, called as a witness by Tinner, testified he was seated at the table right next to Tinner's staff manager, such that he could not back up his chair to get out of his seat without bumping someone at her table, when he allegedly overheard her make a racially derogatory remark towards Tinner. (Trial Trans. p. 162, ll. 7-16.) Clarence James, also called by Tinner, testified that there was one table between where they and Tinner's staff manager were seated. (Trial Trans. p. 133, ll. 1-2.) These statements, among others, could not be reconciled and cast doubt on the credibility of Tinner's witnesses.

Evidence was also presented at trial that Tinner was seeking employment elsewhere during the period he was off work claiming to be sick. (Trial Trans. pp. 486-88.) On May 30, 1996, Tinner filled out an application for employment at American General Financial Group. (Trial Trans. p. 487-88.) On June 1, 1996, he signed a "notification of appointment" and contract for employment with American General Finance Group. (Trial Trans. p. 488.)

The jury who judged Tinner's case was selected properly and without discrimination violative of the Equal Protection Clause or this Court's *Batson* jurisprudence. The jury's determination that United Insurance did not discriminate against Tinner in terminating his employment ten days prior to the date he intended to quit was supported by the facts and law. No egregious error occurred which deserves this Court's attention to correct.

CONCLUSION

The questions presented in Tinner's Petition are not worthy of a Writ of Certiorari because the proper standard for use of a peremptory challenge to strike a minority juror is well-settled, uniformly applied throughout the circuits, and a change in the standard of review would be inappropriate. The courts below properly applied this Court's *Batson* jurisprudence in finding the challenge did not violate the Equal Protection Clause and there is no egregious wrong this Court must address through exercise of its certiorari jurisdiction. For all of the foregoing reasons, United Insurance Company of America, by counsel, respectfully requests that Tinner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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